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Supreme Court of the United States

OCTOBER TERM, 1961

No. 75

CARLIN CONSTANTINE VENUS, Petitioner

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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ONE

This Court should hold that the motion for judgment of acquittal was erroneously overruled by the District Court because (1) the undisputed evidence shows that the petitioner was not guilty of unlawfully failing to keep his local board advised of an address where mail would reach him at all times, (2) the evidence wholly fails to show any willful and knowing violation of the law, (3) the evidence is as consistent with innocence as with guilt and (4) the draft board file showed two addresses at which mail could reasonably be expected to reach petitioner in time for compliance with board orders during the month of February, 1955. 20

TWO

The District Court committed reversible error in refusing to give petitioner's Requested Instructions Nos. 45 and 46, which put to the jury the petitioner's theory concerning the receipt by the board of the card mailed at Los Angeles in February, 1955, notifying the local board of a change of address from Modesto back to San Diego, and the possible misfiling of it. . . 34

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit in this case is reported at 287 F. 2d 304 (December 24, 1960). It also appears in the record. [R. 246-257][1] It is Appendix A to the petition for writ of certiorari at pages 21-33. A dissenting opinion was written by Judge Jertberg. (287 F. 2d 312) It appears in the record. [R. 257-259] See Appendix A to the petition for writ of certiorari at pages 33-35. No opinion was written by the District Court.

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[1] Numbers appearing herein within brackets and preceded by "R." refer to pages of the printed record in this case.

JURISDICTION

The judgment of the Court of Appeals was entered December 24, 1960. A petition for rehearing was duly filed and ordered overruled on February 2, 1961. [R. 260] The time for filing a petition for writ of certiorari was duly extended to April 3, 1961. [R. 261] The petition was filed April 1, 1961. [R. *cover*] Jurisdiction of this Court is, therefore, properly invoked under 62 Stat. 928 (1948), 28 U.S.C. § 1254(1). See also Rules 37 (b)(2) and 45(a), Federal Rules of Criminal Procedure. The District Court had jurisdiction of the indictment under 62 Stat. 826 (1948), 18 U.S.C. § 3231.

QUESTIONS PRESENTED

I.

Whether the conviction based on an indictment that, under the court's charge, limited the offense to the month of February, 1955, should have been reversed because the draft board records and the testimony of the clerk as to her own knowledge showed that petitioner had before and during February, 1955, informed the local board not only of the Modesto address but also of his permanent San Diego address, where mail would always reach him during the month of February, either directly or by forwarding of mail, and petitioner's knowledge and belief that these were sufficient notice, prevent an affirmance of the conviction.

II.

Whether the trial court committed reversible error in refusing to give petitioner's Requested Instructions Numbers 45 and 46, which put to the jury petitioner's theory concerning the mailing of the card at Los Angeles in February, 1955, notifying the local board of his return from Modesto to San Diego, especially when the charge of the court to the jury did not cover the issue.

STATUTE INVOLVED

Section 12(a) of the Universal Military Training and Service Act (50 U.S.C. App. § 462(a)) provides:

> "* * * Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. * * *"

REGULATIONS INVOLVED

Section 1602.4 of the Selective Service Regulations (32 C.F.R. § 1602.4) reads as follows:

> "*Delinquent.*—A 'delinquent' is a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law."

Sections 1641.3 of the Selective Service Regulations (32 C.F.R. § 1641.3) reads as follows:

> "*Communication by Mail.*—It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."

Section 1642.1 of the Selective Service Regulations (32 C.F.R. § 1642.1) reads as follows:

> "*Regulations Governing Delinquents.*—Delinquents,

as defined in section 1602.4 of this chapter shall be governed by the provisions of this part and such other provisions of the Selective Service Regulations as are not in conflict therewith."

Section 1642.41(a)(b) of the Selective Service Regulations (32 C.F.R. § 1642.41(a)(b)) reads as follows:

Report of Delinquent to the United States Attorney. —(a) Every registrant who fails to comply with an Order to Report for Induction (SSS Form No. 252) or an Order for Transferred Man to Report for Induction (SSS Form No. 253) shall be reported promptly to the United States Attorney on Delinquent Registrant Report (SSS Form No. 301): Provided, That if the local board believes by reasonable effort it may be able to locate the registrant and secure his compliance, it may delay the mailing of such Delinquent Registrant Report (SSS Form No. 301) for a period not in excess of 30 days. A copy of such Delinquent Registrant Report (SSS Form No. 301) shall be placed in the delinquent's Cover Sheet (SSS Form No. 101). The local board may report any other delinquent registrant to the United States Attorney by letter stating all the circumstances. A copy of such letter shall be placed in the delinquent's Cover Sheet (SSS Form No. 101).

(b) In endeavoring to locate and to secure the compliance of a delinquent prior to reporting him to the United States Attorney, the local board should contact the delinquent and the "employer" or "person who will always know" the delinquent's address, as shown on the Registration Card (SSS Form No. 1), or any other person likely to know his whereabouts. The local board may enlist the aid of local and State police officials or any other public or private agencies it deems advisable. In no event shall the local board order or participate in the arrest of a delinquent.

STATEMENT OF THE CASE

This case has a long history. (See *Venus* v. *United States*, 266 F. 2d 386 (9th Cir. 1959).) Petitioner was charged by indictment on August 8, 1957, with only one offense, that of failing to report for induction on November 8, 1955, at San Diego, California. [R. 1-2] He pleaded not guilty to this indictment and during November, 1957, he was convicted of that offense and appealed to the Court of Appeals. The Court of Appeals reversed the conviction because of errors committed by the trial court in charging the jury and in refusing to grant certain requested instructions upon the law and the facts.—266 F. 2d 386 (Jan. 8, 1959).

Following the reversal of the conviction the original indictment was tried twice to a jury, resulting on each occasion in a mistrial because of a hung jury. [R. 6-7]

The Government, following the third trial, procured a second indictment containing two counts on December 23, 1959. The first count of this new indictment charged petitioner with the offense of failing to perform a continuing duty to report for induction in April, 1956. The second count charged petitioner with the offense of failing on or about February 1, 1955, to keep his local board notified of an address "where mail" would reach him at all times. [R. 3-4] He was not indicted for failing to perform a continuing duty after February, 1955. The commission of the offense was limited to "on or about" February 1, 1955. [R. 3-4] The instruction of the trial court limited the issue strictly to the month of February. [R. 179, 185] This was approved by the Court of Appeals as the law of the case. [R. 253-254]

The case (two indictments containing one and two counts respectively) proceeded to trial before a jury on May 5, 1960. The evidence was concluded on May 10, 1960. Petitioner made an extensive motion for judgment of acquittal at the close of all the evidence. [R. 162-168] The

trial court denied the motion for judgment of acquittal. [R. 168]

Extensive requested instructions were submitted to the court by both parties. [R. 161-162] Exceptions were taken by the petitioner to the refusal of Instructions Numbers 45 and 46. [R. 17-18, 162] The case was then argued to the jury on May 11, 1960. The charge to the jury by the court began on May 11 and was concluded on May 12, 1960. [R. 169-193] The jury was kept by the court to deliberate for three days and finally reached a verdict late on Saturday afternoon, May 14, 1960. [R. 18, 200-201]

The verdict rendered by the jury found petitioner guilty on only one count, the last count of the second indictment. The jury reported that it was unable to agree on the first indictment and on count one of the second indictment. [R. 18, 200-201] The trial court discharged the jury as to the first indictment and the first count of the second indictment. [R. 201]

Petitioner renewed his motion for judgment of acquittal promptly after the verdict on count two of the second indictment. [R. 32-38, 203, 204] The trial court, over the objection of the United States Attorney, dismissed the first indictment and the first count of the second indictment on its own motion "in the interest of justice on the grounds that there have been four trials." [R. 204] The trial court then overruled the motion for judgment of acquittal as to the second count of the second indictment and held that there was some evidence to support the jury's verdict on the last count of the second indictment. [R. 204]

A motion for a new trial was made. [R. 20-25] It was also overruled. [R. 207]

Petitioner was sentenced to the custody of the Attorney General for a period of three years and ordered to pay a fine in the amount of $500. [R. 40, 207-208] He duly appealed to the Court of Appeals. [R. 41] The Court of Appeals affirmed the conviction. [R. 245-260]

The draft board file of petitioner (except for certain excluded parts) was received into evidence as Government's Exhibit 1. [R. 51] Such file is contained in three cover sheets, which, on the outside, show the many notifications of changes of address by petitioner. [R. 61-65] The three different cover sheets were used by the local board as the basis of addressing cards and letters to the petitioner. [R. 65-66]

Entries on the cover sheet (part of Government's Exhibit 1) under "CHANGES OF ADDRESS:" are numbered, and they were based upon communications received from the petitioner by the board, indicating various changes of address as to where mail would reach him. The cover sheet appearing in Government's Exhibit 1 shows that petitioner notified the local board of six separate changes of address before October, 1955, when the order commanding him to report for induction issued. The local board received and made entries on the cover sheet of the six letters or cards received by it showing changes of address. [R. 211, 213, 215]

Entry number 6 of a change of address that was recorded by the local board on the cover sheet shows a letter was received from petitioner dated June 7, 1954. Such letter appearing in the file reads as follows:

"At this time I wish to inform you of my departure from San Diego to Modesto, California, because of secular employment. The Federal Bureau of Investigation I have notified when in Los Angeles after induction procedures. My new address is (Same employer) 1431 Tenth Street, Modesto, Calif., *but can be reached within one or two days, at my San Diego address.*" [R. 67, 232, 251, 258][2] The

[2] Emphasis is added to show that the local board never failed to know where petitioner could be reached. Also undisputed evidence shows petitioner was then out on bond pending a trial in Los Angeles of an indictment charging a violation of an earlier order to report for induction and no draft board action would be taken until the case was disposed of.

letter was enclosed in an envelope that showed the return address in San Diego. [R. 233]

Upon receipt of this letter by the local board in June, 1954, entry number 6 on the cover sheet under the heading "CHANGES OF ADDRESS:" was made. The entry reads as follows: "1431 - 10th St. 6-7-54, Modesto, Calif. (See letter inside)." [R. 66, 67] The longhand notation "(See letter inside)" for emphasis by the board was written in red on the original cover sheet. [R. 66] The clerk of the local board testified the one and only reason that she made the entry on the outside of the cover sheet opposite item number 6 under the heading "CHANGES OF ADDRESS:" was because, if petitioner could not be reached at the Modesto, California, address, the local board would "look for or try and contact him through his San Diego address." [R. 67]

The clerk of the board said that the board had been notified by petitioner that he had given his parents' San Diego address previously to the order to report and in the letter of June, 1954, as the place where he could always be reached. [R. 67, 68] The clerk testified that Venus was specifically requested, not only to give the address where he lived or resided, but also to give a reference of someone —his parents in this case—who would know his address or through whom mail would reach him. [R. 67-69] The official delinquency report in the draft board file showed that petitioner could always be reached through his father. [R. 75-76, 236]

The clerk testified that the statement appearing in the letter from Venus dated June 7, 1954, "but can be reached within one or two days, at my San Diego address," referred to the address of Venus' parents. [R. 68] This address was written on the outside of the envelope in which the letter came to the board as the *return address* of petitioner. This envelope was attached to the letter dated June 7, 1954, and appears in the file. [R. 232-233] Such envelope showed

the return address of Venus as 650 11th Street, San Diego. [R. 233] This is the same address that was recorded on the cover sheet under the heading "CHANGES OF ADDRESS:" and listed as item number 5. [R. 211]

The clerk testified that Venus had furnished the local board with the 650 11th Street, San Diego, address as his parents' address, where he could always be reached long previous to writing the letter of June 7, 1954. [R. 68]

Venus lived at Modesto, California, from June, 1954, to February 7, 1955, on which date he moved to Los Angeles to work at various places in Los Angeles County. From February 1 to February 8, 1955, mail admittedly would have reached him at Modesto. After February 8 to the end of the month, the 'cutoff' date according to the ruling of both courts below, mail would have been forwarded from Modesto to him by his employer who maintained a business until April, 1955, at the Modesto address given by Venus. [R. 105, 106. 120, 121] Venus had instructed him to do so. [R. 131] He did not leave a forwarding card with the Modesto post office because he knew everyone he corresponded with knew to reach him through his parents. [R. 112]

The father of Venus testified that promptly after making this move of the permanent address of petitioner he—the father—left a forwarding address with the San Diego Post Office, which notified that office that he had moved from 650 11th Street to 1120 30th Street, San Diego, which then was the permanent address of petitioner. [R. 156]

On or about February 19, 1955, after his return from San Diego, petitioner deposited a government post card in the United States Post Office at Los Angeles addressed to his local board, which was several months before the order to report was mailed, as appears below. [R. 106-110] He testified that this card was mailed, as above stated, after he had helped his parents move to 1120 30th Street, San Diego. [R. 108, 110] He also testified that the card notified

the board of the 1120 30th Street address in San Diego. [R. 132, 135] His testimony was fully corroborated by that of a friend and fellow worker. [R. 144-146]

In the same mail, according to undisputed testimony, Venus deposited a letter properly stamped and addressed to Bertha Leonard in San Diego that enclosed a postal money order that was received by her in due course of the mails. [R. 107, 108] She received it and so testified. [R. 154] So did his friend who saw him deposit it in the mails. [R. 145-146]

Long after Venus moved from Modesto and months after the February 'cutoff' date the local board prepared and mailed to him at the Modesto address an order to report for induction. It was dated October 28, 1955, and commanded him to report for induction at San Diego in November, 1955. [R. 53] The order was placed in an envelope addressed to 1431 10th Street, Modesto, California, and not to the permanent San Diego address shown in the communication of June, 1954, to the board. [R. 54] One of the three cover sheets showing the 1431 10th Street, Modesto, address was used in the preparation of the order and the envelope in which it was mailed. [R. 62] It was obviously one of the several cover sheets that failed to show the words: "See letter inside" that identified the San Diego address. [R. 213, 215] Using the wrong cover sheet may have caused oversight of the parents' address in the file that was noted on the original cover sheet.

The order to report for induction was never received by Venus at his San Diego address. There may have been several reasons. One: the building at the Modesto address where he lived and worked was torn down in April, 1955, and thereafter no longer existed and did not exist in October, 1955. Two: Venus had not left a forwarding address from the Modesto address back to his San Diego address at the post office in Modesto. [R. 112, 130-131] The reason for this omission was that petitioner assumed the local

board had received the card showing a change of address that he mailed to the local board from Los Angeles in February of 1955, the same as it had received five other such notices and, because of this belief, did not leave a forwarding address with the post office in Modesto, especially since he had notified the board in June of 1954 of the address of his parents in San Diego as a place where mail would alway reach him. [R. 130-131]

Venus testified, however, that had mail been received by his former employer, Morrison, in Modesto he would have forwarded it to Venus at San Diego at any time through the month of April, 1955. [R. 131] Even after Venus left Modesto there was mail from the United States Marshal pertaining to his court appearances in Los Angeles that was received by him through his parents' San Diego address when addressed to it as he had notified the board to do but which it did not do. [R. 138, 139]

The local board admittedly never attempted to locate Venus at the San Diego address because the draft board mail that had been sent to him at the Modesto, California, address had never been returned to the local board by the post office. [R. 68-69, 73, 75, 76-77]

In February, 1955 (the only material time involved in the trial and on appeal), the draft board file was out of the possession of the board in San Diego. It had been for months in the hands of Selective Service officials in Los Angeles so that it could be used in a trial of Venus for an earlier refusal to comply with an order of the local board issued in 1954. [R. 77-78] The card mailed by Venus in February, 1955, notifying the board of a change of address, was not placed in his draft board file and may have been misfiled, according to the clerk of the local board even if it were received. [R. 86] The clerk testified that she did not remember receiving the change of address card only because it could not be found in the file. She had no recollection independent of this failure to find the card. [R. 86]

Upon the fourth trial the clerk, when asked, said that a search for the February, 1955, card had first been made after the third trial. [R. 89] The search was directed by the United States Attorney. [R. 89] It was in only 3,000 out of 14,000 files and five years after the controversy arose. [R. 89-93]

Venus did not learn of the existence of the October, 1955, order to report for induction until April, 1956, when he was interviewed by an F.B.I. agent. [R. 112] He wrote the local board after the interview with the F.B.I. agent, who failed to advise what to do except for Venus to write the board, which he did, but he received no answer to his letter to the board as to what to do. [R. 237, 243] The local board then made a notation, however, of his new address at 756 Pier Avenue, Santa Monica, California, on April 10, 1956, and later, on November 15, 1956, noted another change of address to 302 Market Street, Venice, California. All of these many notices, seven or eight in all, were long before the indictment charging Venus with a failure to keep the local board informed of a place where mail would always reach him during February, 1955, which time was a mere short interval between many notices and was also eight months before the board mailed the order to report in the latter part of October, 1955. [R. 211, 212, 213]

For a briefer statement of the facts see the dissenting opinion of Judge Jertberg. [R. 257-259] Compare the statement in the opinion of the majority of the court below. [R. 246-248, 250-252]

SUMMARY OF ARGUMENT

ONE

This Court should hold that the motion for judgment of acquittal was erroneously overruled by the District Court because (1) the undisputed evidence shows that the petitioner was not guilty of unlawfully failing to keep his local board advised of an address where mail would reach him at all times, (2) the evidence wholly fails to show any willful and knowing violation of the law, (3) the evidence is as consistent with innocence as with guilt and (4) the draft board file showed two addresses at which mail could reasonably be expected to reach petitioner in time for compliance with board orders during the month of February, 1955.

The ruling of the District Court, approved by the Court of Appeals, that the jury should be restricted to the month of February, is the law of the case. It was error for the Court of Appeals later on in the opinion to hold that petitioner violated a continuing duty that extended to October, 1955, an eighteen-month period from June, 1954. (*Venus* v. *United States*, 287 F. 2d 304, 308, 309-310, 311) The violation of a continuing duty is a separate offense under the regulations, which was not charged in the indictment.--*Graves* v. *United States*, 252 F. 2d 878 (9th Cir. 1958).

Holding the petitioner guilty through October, 1955, is contrary to the evidence. At all times from June, 1954, to February, 1955, mail would have reached him, under the direction of his June, 1954, letter, at the San Diego address of his parents.

The court below shifted the issue of liability under the indictment from February, 1955, to October, 1955, thereby invoking a continuing duty not alleged in the indictment.

It was error for the court below to hold that Venus no longer complied with the law after February 1, 1955, because this is contrary to the record showing without dispute that he would have received mail in Modesto up to Febru-

ary 8, 1955, and thereafter at his San Diego address in accordance with directions in his letter of June 7, 1954. That he failed to leave a forwarding card at the post office in Modesto is immaterial, because he knew that mail would reach him at San Diego, his usual correspondents being informed or instructed to send mail to him there at San Diego.

The court below properly assumed that mail addressed to petitioner would reach him during the first eight days of February but improperly assumed that it would not thereafter. The latter assumption is contrary to the instructions in the letter of June 7, 1954, to the board that he could be reached through his parents in San Diego.

The holding of the court below that it could assume that mail would not reach Venus during the month of February, 1955, is contrary to *Bartchy* v. *United States*, 319 U. S. 484 (1943). That decision held that if a registrant notified the board of an address that he believed would cause draft board mail to reach him he is not in violation of the regulations. The holding of the court below substitutes the assumption of the court after the fact for the reasonable assumption of petitioner based upon the transactions during the time they occurred.

One fact disputing the holding of the court below that mail would not have reached Venus at the San Diego address during the month of February, 1955, or until October, 1955, is the draft board file itself. The file shows that on May 4, 1954, an order to report for induction reached Venus through the 650 11th Street address. If that order to report reached him before June 7, 1954, then how can the court below, under any theory, contend that the October, 1955, order would not have reached him a year and six months thereafter?

It was wrong for the court below to hold that the 650 11th Street address was not petitioner's address but only that of his parents. The record shows that this was

petitioner's permanent address even though it was his parents' home. The clerk unequivocally testified that she knew he could always be reached through his parents and that she knew the address was his home. The delinquency notice, dated January 3, 1956, named his father, John Venus, as the one who would always know his address.

The court below found that no mail was directed to Venus during February, 1955. It was speculation that mail directed to him during that month would not have reached him either at Modesto or at San Diego.

It is true that the order of October, 1955, did not reach Venus. This is no proof that Venus did not have a basis for a reasonable belief that mail would reach him from the board based on the June 7, 1954, letter. Since this letter supplied reasonable basis for such belief, then it is immaterial that the order of October, 1955, did not reach him.

It is error to speculate on circumstantial evidence that is as consistent with innocence as with guilt in order to fix willful and knowing violation of the law.

The Government was required to prove guilt beyond a reasonable doubt. The only way to prove beyond a reasonable doubt that mail would not have reached him during February, 1955, would be to show that mail was sent to him during that month and was returned unclaimed. The Government did not do this. The Government was content to rely on the nonreceipt of the October, 1955, order. In the absence of more there is nothing in the case but pure speculation that mail would not reach him during the month of February, 1955, either at Modesto or at San Diego.

Since a great multitude of uneducated, untrained and ignorant registrants are among the many millions involved with the draft law the court below should have been less strict and more reasonable in its interpretation of the Act. There are millions of untrained and uneducated men so involved. Even well-educated men are not skilled in draft procedure. The law requires that registrants be dealt with

as though they are not litigants represented by counsel, the court below to the contrary notwithstanding. Even the trial court, as requested by petitioner, charged the jury specifically and expressly on this point. [R. 179]—*United States ex rel. Berman* v. *Craig*, 207 F. 2d 888, 891 (3rd Cir. 1953); *United States* v. *Greene*, 220 F. 2d 792, 794 (7th Cir. 1955).

The fact that petitioner did not exhaust his administrative remedies by appealing the classification or reporting for and thereafter refusing to submit to induction proved that he did not receive the classification card and the order. He had previously taken both of these steps in 1954.

The court below employed afterthought viewpoint of the fact rather than the facts as they appeared to Venus, which is contrary to *Bartchy* v. *United States*, 319 U. S. 484 (1943). The question of his guilt is not to be based upon the assumption of the court below but upon the reasonable assumption of petitioner.

Prosecution of the second count of the second indictment is a needless prosecution and involves nonexistent draft board procedure and pure speculation. The file was out of the hands of the local board for use in prosecution of the 1954 indictment at Los Angeles, from November, 1954, to July, 1955. This made impossible any draft board proceedings during February, 1955, the crucial month. The failure to keep the board informed during that time is purely hypothetical and moot as far as any draft board proceedings were concerned.

The local board violated Section 1642.41 (a) (b) of the Selective Service Regulations (32 C. F. R. §1642.41 (a) (b)) by making no effort whatever to locate Venus as a delinquent and find out if he failed to comply with the law. Remember that he had always co-operated in every way. The clerk knew that he could always be reached through his parents in San Diego.

Had the board reached Venus it would have discovered the fact that he was not delinquent and that the board had made a mistake by not trying to reach him in care of his parents in San Diego, as he had said in his June 7, 1954, letter to the board. It would have shown to the board that Venus was in the dark as to what was going on. The board would have learned before reporting him to the United States Attorney that he had not received the classification card or the order to report at the address shown in his June 7, 1954, letter to the local board. The purpose of the above-mentioned regulation is to raise an army rather than to imprison men through delinquency proceedings, and hence the duty to first make an effort to reach the registrant.

Petitioner was a victim of an unfortunate set of circumstances and bizarre possible errors of postal and draft board administrative proceedings. The failure of the two draft board communications to reach him and the claimed failure of his post card to reach the board is extraordinary. The failure to send the order to San Diego may be due to a draft board error. The original cover sheet had become worn out. On that cover sheet were the red warning words opposite the June 7, 1954, communication from Venus: "(See letter inside)." This letter told the board he could be reached in care of his parents in San Diego.

In preparing the first and second new cover sheets these warning words were omitted. One of these new cover sheets was used in addressing the classification card and the order to report mailed to Modesto, rather than the original cover sheet with the warning words on it which was inside the file. The obvious reason the card and order were mailed mistakenly to Modesto instead of San Diego was the clerk's overlooking the warning words "(See letter inside)" on the original cover sheet inside the newer one.

This case is controlled by *Bartchy* v. *United States*, 319 U. S. 484 (1943) and *Ward* v. *United States*, 344 U. S. 924 (1953).

TWO

The District Court committed reversible error in refusing to give petitioner's Requested Instructions Nos. 45 and 46, which put to the jury the petitioner's theory concerning the receipt by the board of the card mailed at Los Angeles in February, 1955, notifying the local board of a change of address from Modesto back to San Diego, and the possible misfiling of it.

Requested Instruction No. 45 involved the factual issue of whether the draft board actually received the post card from the petitioner. [R. 17-18] There was great uncertainty and doubt as to whether the card was received and misfiled according to the clerk's testimony. [R. 86] Petitioner's testimony and that of his supporting witness were that the prestamped government post card showing his change of address from Modesto to San Diego was actually deposited in the mails at Los Angeles after being duly addressed to the local board.

The file was out of the draft board office and in the possession of the Selective Service at Los Angeles and Sacramento. Only a dummy file was in the draft board office. The clerk testified that the practice was to file mail of a registrant whose file was out of the office in a dummy file. She testified that she had no independent recollection of whether the post card was received. Her testimony was based exclusively on her inspection of the files after the indictment was returned several years after the card was mailed.

Who knows what happened to the post card, if it were received, from June, 1954, to the date of the trial? The clerk merely testified that the card was not located in the file. This testimony did not prove that the card was not received. It could have been received and misfiled.

This vital issue was never put to the jury. The only thing the court covered in the charge was presumption of receipt by the board and this only if the jury believed that Venus actually mailed the post card as testified. This was

not enough. The jury also was allowed by the trial court to consider the fact that the draft board clerk's not finding the card in the file was proof that it was not mailed.

With the danger of this thought causing the jury to believe that the card was not mailed, it was necessary for the court to charge that the presumption that employees do their duty was not conclusive proof that the card was not received by the witnesses who handled the mail. Petitioner was also entitled to have the jury consider the fact that the employees may not have done their duty but made a mistake and misfiled it. See Requested Instruction No. 45. [R. 17-18]

Requested Instruction No. 46 more specifically covered the subject that the presumption of receipt of the card cannot be overcome or rebutted by the presumption that the board employees performed their duties and that it was incumbent upon the Government to prove by the witnesses who handled and processed the incoming mail that the card was not actually received by the local board. [R. 18]

Requested Instructions Nos. 45 and 46 were not ultimate issues to be determined by the jury. They dealt with a very vital and crucial evidentiary question that was incidental to the ultimate issue of fact of whether the card was actually mailed. The charge of the court at first pivoted, at three different places, the question of guilt or innocence purely upon whether the card was actually mailed in Los Angeles as claimed by Venus.

The theory of petitioner was that the card was mailed, received and misfiled by board employees. It was a very vital thing for the jury to consider that the card was misfiled by board employees as proof that petitioner actually mailed it. Since the court had pivoted the entire matter on the mailing of the card and did not at any place in his charge allow the jury to consider whether board employees had misfiled it, it was imperative that the court cover the points in the charge as requested in Instructions Nos. 45 and 46.

ARGUMENT

ONE

This Court should hold that the motion for judgment of acquittal was erroneously overruled by the District Court because (1) the undisputed evidence shows that the petitioner was not guilty of unlawfully failing to keep his local board advised of an address where mail would reach him at all times, (2) the evidence wholly fails to show any willful and knowing violation of the law, (3) the evidence is as consistent with innocence as with guilt and (4) the draft board file showed two addresses at which mail could reasonably be expected to reach petitioner in time for compliance with board orders during the month of February, 1955.

The District Court ruled that the consideration of the jury about petitioner's guilt or innocence would be restricted exclusively to the month of February. Nothing after the last day of that month was material or could be considered. [R. 179, 185] The Court of Appeals held that this was a proper instruction and that it would be taken as the law of the case. (287 F. 2d 304, 309-310) [R. 253-254] These holdings of the court below became the law of the case.

It could not reasonably be extended beyond the month of February since there was no allegation in the indictment as to a continuing duty. Inconsistent with this holding the court below refers to mail (two letters) being sent to the petitioner by the board at Modesto in September, 1955, and October 28, 1955. (287 F. 2d 308, 310)

The court below then refers to the 18-month period from June, 1954, to the end of 1955 as a period that petitioner knowingly violated the law and added that he had a "continuing duty during that 18-month period." (287 F. 2d 311) This holding was not only inconsistent with the holding that the cutoff was the month of February but it was also in direct conflict with an earlier holding by the court below that a continuing duty could not be relied upon un-

less alleged in the indictment.—*Graves* v. *United States*, 252 F. 2d 878 (9th Cir. 1958).

The reason by which the court below makes the above holding is a mystery and is contrary to fact. There is not one shred of evidence to support it. The record points to the contrary. It shows that mail sent to Venus from June, 1954, until February 8, 1955, would have reached him at the Modesto address or the San Diego address.

The month of February, 1955, is the crucial month. What happened before February is irrelevant and immaterial. What happened after February, 1955, is also irrelevant and immaterial under the ruling of the trial court, with which the court below could find no error.

The court below shifted the theory of guilt and approved conviction of petitioner of a false charge for failure to perform a *continuing duty*, an act with which he has never been charged by indictment as required by law. The trial court, moreover, excluded the theory of continuing duty. With five years of opportunity to review the file and prosecute, even the Government has never made such a charge as that conjured up by the court below.

In the opinion, the court below states: "After that time he no longer complied with the law with which he was so familiar." (287 F. 2d 310) This reference is made to the period of time subsequent to February 1, 1955, which is entirely immaterial to the February limitation by the court. Yet the court below makes this statement in face of the facts: (1) during the period of time from February 1, 1955, to June, 1955, the registrant was under a prior indictment and was appearing in court monthly for the purpose of trial, which trial was continued from time to time; (2) he was appearing openly and notoriously before United States district judges, prosecuting attorneys, marshals and his own counsel, all in an effort to take every step to protect his rights allowed by law; and (3) the file was out of the hands of the board and no correspondence was going on between the board and Venus.

The evidence, without dispute, shows that petitioner would have received mail while in Modesto up until February 8, 1955, the date that he moved from there. This Court should also conclude that mail would have reached Venus through his parents' old address up until February 21, 1955, the date that he helped his parents move to the new address. The Court should equally conclude that mail would have reached Venus in San Diego at the new address of his parents from February 21 to February 28, 1955, because his father filed a forwarding address with the post office.

Even during the entire month of February, including the last seven days, Venus' employer in Modesto could have and would have forwarded mail to him (as he had been doing for him on previous occasions) and also his parents would have and could have forwarded mail to him if it had been directed to the San Diego address, as was done previously.

In affirming the conviction the court below completely disregarded the following undisputed facts: (1) petitioner had reasonable and full cause to believe that mail would be sent to him at San Diego in event it did not reach him in Modesto; (2) he had failed to leave a forwarding address at Modesto because he assumed he would receive mail through his San Diego address; and (3) he had no notice whatever of the card mailed notifying him of the classification in September, 1955, and no notice whatever of the order to report for induction mailed in November, 1955.

In the face of the undisputed evidence in this case showing that Venus could reasonably expect that mail would reach him during the month of February at the San Diego address given the board in the letter of June 7, 1954, then the sole basis for the conclusion of the court below that the petitioner was guilty is that there is no official notice in the draft board file covering the month of February. It is unjust and unreasonable in these circum-

stances to affirm the conviction of Venus for a violation of the Act and regulation solely because he did not act immediately after February 21, 1955, and before February 28, 1955, by writing another letter.

The court below states "we might assume, although there is no proof of the fact, that mail directed to appellant by the local draft board during *the early days* of February to the Modesto address would have reached him. We cannot assume that mail directed by the local draft board during the month of February, but after the early days thereof, to the appellant at the Modesto address would have reached him." (287 F. 2d 310)

Before discussing in detail the facts which disclose the error of the court below in the making of this statement it should be observed that the court below states "we might assume" and again states "We cannot assume." The question of guilt is not based upon the *assumption of the court below* about whether mail would reach Venus during the month of February, 1955. The question of guilt is based on whether *Venus could reasonably assume* or reasonably expect that mail would reach him at either one of the addresses given by him in the letter of June, 1954. The court below did not discuss the question of whether or not Venus could reasonably assume that mail would reach him during the month of February. The court below, to the contrary, defied this commandment of reasonable assumption of the registrant laid down by this Court in *Bartchy* v. *United States*, 319 U. S. 484 (1943).

One of the most striking pieces of evidence in the draft board file that points out that Venus could reasonably have expected to receive mail from the board at 650 11th Street, San Diego, California, is that on May 4, 1954, as shown in the registrant's file, an order to report for induction was mailed to him at 650 11th Street, San Diego, California, and he received it through his parents. Since he had received this prior order to report when it was addressed to this

address, it is stretching the imagination of man too far to come to the conclusion that he could not reasonably have expected in February, 1955, to receive mail at this address in time for compliance with any orders contained in such mail sent during February.

The court below states that 650 11th Street, San Diego, California, on June 7, 1954, was not then the address of petitioner's parents. This conclusion is reached by the studied effort to peruse the registrant's file and learn that six years have elapsed since the registrant first signed up with the draft board when he listed his parents' address and had never sent in an official form changing their address. Yet the cover sheet shows that in 1952 he used the 650 11th Street address and once again in the letter of 1954 addressed to the board with the return envelope showing 650 11th Street, San Diego, California. Even though no official memorandum in the file stated that 650 11th Street was the parents' address, the clerk of the local board knew this as a matter of fact and she also knew this was the permanent home of Venus and so testified to both facts.

This is one issue on which the evidence is unerringly in favor of petitioner, and, rather than answer the point, the court below disregarded it. The court failed to discern (1) that the address given at 650 11th Street, as stated in the June 7, 1954, letter was one of the petitioner's two addresses at which he could be reached and (2) nowhere in the record does petitioner claim that the reason this address was given was because it was the address of his parents, but the record shows that this was his permanent and own home address, at which mail would reach him "through his parents." To blandly state that this "is beside the point" is to ignore the regulation (32 C.F.R. § 1641.3) and to disregard the ruling of this Court in *Bartchy* v. *United States*, 319 U. S. 484 (1943).

The holding of the court below disregards entirely the testimony of the draft board clerk that the board knew and

she knew petitioner could be reached at all times in care of his parents' San Diego address. Even the delinquency notice, dated January 3, 1956, reporting Venus as a delinquent for failing to report on October 28, 1955, shows the person who would always know the petitioner's address was John Venus whose address is shown erroneously in the form as 184 National Avenue, National City, California. [R. 235-236] The testimony of the clerk is undisputed that she knew 650 11th Street as the address of the father. [R. 68] The envelope containing the letter of June 7, 1954, showed the 650 11th Street address. [R. 233]

The court below conceded that no mail was ever directed to the petitioner during the crucial month of February. If no mail is directed to a man at either one of two addresses where he is employed or where his parents are living, then how, within the realm of any recognized rule of law, could the court below come to the conclusion—without wild speculation—that the Government has proved that mail would not reach the registrant at either one of those two addresses during that period?

How could the court below speculate on circumstantial evidence and find willful and knowing violation of the law during February, 1955? Surely reason and justice do not compel a conclusion on nothing but circumstantial evidence that there was a willful and knowing violation of the law by failing to give the board the new San Diego address during the last seven days of February. The most that can be made out of this is that the evidence is as consistent with innocence as it is with guilt; and since the jury and the court below were required to speculate willful and knowing violation of the law, the verdict of the jury on this point should be set aside and the holding of the court below should be vacated because of no evidence and for speculation.

The only possible way by which the Government could prove beyond a reasonable doubt that mail would not have reached the petitioner at either of these addresses during

the month of February, 1955, would have been to address such mail to petitioner and then show that he failed to receive it. This the Government did not prove and could not prove because no such correspondence was mailed.

The only other method of proving that mail would not have reached him in time for compliance is solely by circumstantial evidence. In this field of circumstantial evidence the undisputed evidence shows that for the first eight days in February the registrant actually was at the Modesto address.

The court below, in refusing to recognize the undisputed evidence, dealt harshly with petitioner, and to elude the facts it had to treat him as if he were a lawyer before the draft board. It made the regulation a gin. Section 1641.3 of the Selective Service Regulations (32 C.F.R. § 1641.3) was construed by the court below, in this case, so as to make it a snare to entrap the innocent and allow the Government to use it as a dragnet by which to convict when there is no evidence of guilt.

The court below ignored the fact that there are millions of uneducated and untrained registrants that are involved under the draft law. The petitioner in this case acted like any other reasonable and prudent draft registrant untrained in the law. He should be given the same benefit that the law accords to a farm boy, a factory worker or any other registrant untrained in the law. It is wholly irrelevant and immaterial that the petitioner had or had not complied with the law on previous occasions. It is irrelevant that the petitioner knew about the requirement of the regulation to keep the draft board advised where mail would reach him at all times. In view of the fact that draft registrants, millions of them, are uneducated other courts have rejected the argument that registrants should be dealt with as though they were litigants represented by counsel as did the court below in this case. (*United States ex rel. Berman* v. *Craig*, 207 F. 2d 888, 891 (3rd Cir. 1953); *United States* v. *Greene*,

220 F. 2d 792, 794 (7th Cir. 1955)) The trial court charged the jury as held in these cases. [R. 176]

The court below held, in substance, that men of ordinary affairs, such as is this petitioner, may not use their family address (which is their permanent address), in place of their temporary place of abode, and reasonably expect to receive mail through it. This is in direct violation of the common everyday course of human affairs in well-known family relationships between parents and children who are adults to use the address of their parents, especially when they are traveling salesmen or seamen. But such a way of life the court below was willing to sidestep in order to sustain a conviction. It also violates the principle of the two decisions last above cited.

The question of guilt is not based upon the *assumption of the court below* about whether mail would reach Venus during the month of February of 1955. The question of guilt is based on whether *Venus could reasonably assume* or reasonably expect that mail would reach him at either one of the addresses given by him in the letter of June, 1954. The court below did not discuss the question of whether or not Venus could reasonably assume that mail would reach him during the month of February. The court, to the contrary, defies this commandment of reasonable assumption of the registrant laid down by this Court in *Bartchy* v. *United States*, 319 U. S. 484 (1943), above stated.

The court below took the viewpoint of looking at the facts as they appeared to the court as an afterthought, not as they appeared to Venus during the draft board proceedings. This is like the illegal practice in cases of self-defense in murder prosecutions, to look at the facts as they appeared to the court after the fulmination resulting in a shooting instead of viewing the facts as they appeared to the defendant. The court below overlooked the principle of *Bartchy* v. *United States*, 319 U. S. 484 (1943), that if a registrant could reasonably do what he had done in writing the board and notifying other persons about his whereabouts

that, reasonably, mail directed to him would reach him. The court below did not take this view. It is submitted that this Court will view the facts from the standpoint of the registrant. If Venus could reasonably have expected that mail would reach him in time for compliance at either one of the addresses given in the letter of June, 1954, then the petitioner is not guilty as a matter of law. It was error for the court below to conclude, in the face of the record in this case, that Venus could not reasonably expect mail to come into his hands at either one of the addresses given in the letter of June, 1954, during the month of February, 1955.

A very significant fact corroborates the contention of the petitioner that he did not receive either the draft board card mailed in September, 1955, or the induction order mailed in November, 1955. It is that the petitioner did not exhaust his administrative remedies by appealing the 1-A classification made in September, 1955, or by reporting for induction and refusing to submit to induction in November, 1955.

The draft board record shows that he had previously taken both of these steps and exhausted his remedies for the defense of the prosecution instituted in 1954 at Los Angeles and later dismissed. It is unreasonable to assume that a registrant who is a conscientious objector or a minister would deliberately refuse to exhaust his administrative remedies when he knows the steps required by law, as did the petitioner.—*Smith* v. *United States*, 327 U. S. 114 (1946); *Falbo* v. *United States*, 320 U. S. 549 (1944); *Williams* v. *United States*, 203 F. 2d 85, 87 (9th Cir. 1953), cert. denied 345 U. S. 1003 (1953); *Skinner* v. *United States*, 215 F. 2d 767 (9th Cir. 1954), cert. denied 348 U. S. 981 (1955); *Frank* v. *United States*, 236 F. 2d 39 (9th Cir. 1956); *Prohoroff* v. *United States*, 259 F. 2d 694 (9th Cir. 1958), cert. denied 359 U. S. 907 (1959), reh. denied 359 U. S. 962 (1959).

The prosecution of the second count of the second indictment appears to be an unjust prosecution. It would accomplish nothing because there was no real violation.

There was no actual or intended injury to the Government. It was legally impossible for the draft board to take any action whatever while the draft board record was out of its hands and was being held by the State Director to be used in the prosecution for the refusal to submit to induction in July, 1955. Admittedly, the file was out of the hands of the draft board from November, 1954, to July, 1955. The failure, if any, to fully comply with the regulations about notification of change of address to the board was harmless error. The failure, if any, was entirely moot. The prosecution in this case for a harmless thing is like prosecuting a man for shooting a dead horse.

It is remarkable that the draft board never made any effort to locate Venus after the alleged delinquency. The official notice of delinquency made to the Department of Justice, however, stated that he was located, on October 28, 1955, in Modesto, California. [R. 236] This is a false statement appearing in an official record. [R. 68-69, 73, 75, 76-77]

The draft board knew that Venus had always co-operated and complied in former proceedings of the case right down to the point of answering an order to report for induction and refusing to submit, resulting in his first prosecution. The draft board file is replete with proof that Venus at all times co-operated. [R. 224-226] In view of this knowledge and belief on the part of the board, had there been a compliance by the board with Section 1642.41 (a)(b) of the Selective Service Regulations (32 C.F.R. § 1642.41 (a)(b)) there never would have been any basis for the indictment for failure to keep the local board informed.

The very purpose of the above regulation is to accomplish the intent of Congress in passing the law that was to raise an army and get men in the army rather than put them in prison. The court below and the draft board, acting together, have interpreted the regulation contrary to the intent of Congress. No effort was made to determine delinquency by trying to locate Venus before ordering the Department of Justice to put him in prison. This action

is manifestly contrary to the plain intent of the regulation and the spirit thereof, as well as the Act of Congress. Venus pleaded with the draft board in a long letter, dated September 4, 1956, showing that he had no knowledge of the classification card or of the order to report for induction. [R. 243]

Venus is the victim of an unfortunate set of circumstances resulting in his ignorance of what was going on in his draft board case. A cloud of doubt covers the entire case that makes the fair and the just conclude that the evidence in this case is as consistent with innocence at it is with guilt.

The only thing the court below had to support a willful violation of the Act and the Regulations is speculation and pure conjecture. Why was the card and the notice not mailed to his father's address in San Diego? Even the clerk of the draft board that prepared the two documents could not explain why they were mailed to Modesto when the board knew that he could always be reached through his parents in San Diego. Could it not be that the clerk, in dealing with Venus, inadvertently used the wrong cover sheet in preparing the documents?

The reason there were three cover sheets instead of the usual one was because of the multitudinous transactions requiring frequent handling of the draft board file and the mailing of it back and forth from San Diego to Sacramento and to Los Angeles. The minutes disclose the facts that produced the hardship and wear upon the first cover sheet. [R. 223-225] The clerk testified that the reason the two extra cover sheets [R. 213, 215] were made was because the first cover sheet became dog-eared and was coming apart, making it no longer suitable for the holding of draft board papers. [R. 61]

The original cover sheet (which was put inside of the file and the new cover sheets) is the only one that had on it the warning words "(See letter inside.)" [R. 66, 211, 213, 215] This notation referred to the letter of June 7, 1954, informing the board that he could always be reached

through his parents in San Diego. [R. 67] This fact was within the personal knowledge of the clerk who handled the mailing of all letters, notices and other documents from the local board.

The obvious reason that the two documents were mistakenly mailed to Modesto instead of to San Diego was that the new cover sheet did not have the same warning words "See letter inside" as did the original cover sheet. Had the new cover sheets had the same warning words on them the mail would have been sent to San Diego instead of to Modesto and this prosecution would never have resulted.

Another mystery is what happened to the card that Venus mailed from Los Angeles to San Diego notifying the board of his leaving Modesto and going to Los Angeles as well as notifying the board of a change of his permanent address, the home of his parents in San Diego. At the time the card was mailed from Los Angeles the draft board file was out of the office and there was a mere dummy file kept. The clerk testified that the card could have been misfiled and that may have been the reason that it could not be found in the file. [R. 86] The six-year belated search of the files through only 3,000 of the 14,000 files [R. 89-93] is not enough to dispel the doubt created by the admission of the clerk of the possible misfiling.

As to what happened to the two notices that were sent to Modesto, this still remains a mystery. Venus said he did not receive them. It is unreasonable to conclude that if he had received them he would have thrown them in the wastebasket or destroyed them. He knew he had to exhaust his administrative remedies by appealing from the classification and also by reporting for induction and refusing to submit to induction.

In the bizarre circumstances of this case it would be unjust to affirm the conviction, because the evidence is as consistent with innocence as it is with guilt. There

is no evidence of willful intent to violate the law, and the judgment should be reversed.

The court below has misinterpreted *Bartchy* v. *United States*, 319 U. S. 484 (1943), so as to reject it when the case obviously controls. It held that because the jury could not reasonably expect mail to come into Venus' hands in time for compliance he is guilty. The court below should have used the yardstick of 'could Venus reasonably expect that mail would reach him.'

In *Bartchy* v. *United States* 319 U. S. 484 (1943), this Court said that a registrant had performed his duties under Section 1641.3 of the regulations when he had, in good faith, provided a chain of forwarding addresses by which mail "sent to the address which is furnished the Board, may be by the registrant reasonably expected to come into his hands in time for compliance." The court below fails to point out a single shred of evidence by which any reasoning person could come to the conclusion that Venus could not reasonably expect in February, 1955, that mail would reach him at Modesto until the 8th or after that at 650 11th Street, San Diego. This is admittedly so during the period of time from February 1 to February 21, 1955, the latter date being the day Venus helped his parents move. It should also be held so for the succeeding seven days, during which the forwarding card filed by his father, with the San Diego post office address would have insured a receipt of mail.

The holding of the court below is diametrically opposed to *Ward* v. *United States*, 344 U. S. 924 (1953) (reversing *Ward* v. *United States*, 195 F. 2d 441). In this case Venus did identically what Ward did. (1) Ward gave the address of his employer as well as his residence address. In this case Venus gave the address of his employer in Modesto as well as the address of his parents, at which the record and the undisputed testimony of the clerk of the local board show was his permanent address through which mail would always reach him within two days. (2) In the

Ward case the board did not attempt to use the business address but used only the residence address from which Ward moved without notifying the board. In this case the board used the Modesto address of Venus' employer from which Venus had moved months before the order was mailed without notifying the board. (3) In this case the board made no effort to reach Venus through his parents' address, which was his permanent address, but attempted to reach him only through his employer's address in Modesto. The facts in the two cases are identical in effect. (4) In *Ward* v. *United States* (344 U. S. 924) Ward gave two addresses to the local board and the local board used only one, from which Ward had moved, and made no attempt to use the other. In this case Venus gave the board two addresses, one of which he had moved from, and the board admittedly made no attempt to use the other address.

It is manifest, therefore, that the distinction that the court below has drawn between *Ward* v. *United States* (344 U. S. 924) and the facts in this case is groundless and wholly without justification. So how could that court, under any circumstances, make a distinction between this case and *Ward* v. *United States* (344 U. S. 924)? Instead of petitioner misplacing reliance upon *Ward* v. *United States* (344 U. S. 924), the court below made a distinction without a difference.

It is respectfully submitted that petitioner should have been acquitted because (1) the undisputed evidence shows that the petitioner was not guilty of unlawfully failing to keep his local board advised of an address where mail would reach him at all times, (2) the evidence wholly fails to show any willful and knowing violation of the law, (3) the evidence is as consistent with innocence as with guilt and (4) the draft board file showed two addresses at which mail could reasonably be expected to reach petitioner in time for compliance with board orders during the month of February, 1955.

TWO

The District Court committed reversible error in refusing to give petitioner's Requested Instructions Nos. 45 and 46, which put to the jury the petitioner's theory concerning the receipt by the board of the card mailed at Los Angeles in February, 1955, notifying the local board of a change of address from Modesto back to San Diego, and the possible misfiling of it.

Requested Instruction No. 45 related to a highly disputed and important fact question for the jury to decide. [R. 17-18] The trial judge in his charge repeatedly and on several occasions informed the jury that the whole question of whether the petitioner was guilty or not in failing to keep the board advised of where mail could reach him at all times depended solely upon whether they believed he did or did not deposit the card in the mails in Los Angeles in February, 1955. The members of the jury were told that this was the crucial and important question for them to determine in reaching a verdict of whether petitioner was guilty or not guilty under the second count of the last indictment. [R. 178-179, 184-186, 190]

The trial court in charging the jury about the law of mailing merely referred to the presumptions that correspondence properly addressed, stamped and deposited in the mails is presumed to have been received in due course of mail and that the presumption of receipt could not be based upon another presumption, "that a public officer performed his or her duty in mailing a letter." [R. 175]

In connection with the charge on the mailing of the postal card, the trial court said nothing about the disputed question as to whether the card was actually received and misfiled by the board. Upon the trial petitioner and his witness Beil testified that the Government postal card containing notification of change of address was duly addressed and deposited in the United States mails at Los Angeles in February, 1955. [R. 106-110, 132, 135, 144-146]

The draft board file and the undisputed testimony of the clerk of the local board showed that the draft board file was out of the possession of the board in February, 1955, and was not returned until July of that year. [R. 77-78] The clerk testified that it was the practice to have a dummy file during the absence of any file from the board. She further testified that it was possible that the card was not received and, if received, may have been misfiled. [R. 86]

The sole basis for her testimony that the card was not received was merely that, on examination of the file after it was returned, the card was not in the file and that it would normally have been in the file if the normal practice and procedure of the office was followed by taking things out of the dummy file on return of the original file and placing them in the original file. She testified that because the card was not found in the file during the examination of it in preparation for the trial of this case it was never received by the local board. Albeit, she earlier testified that a mistake may have been made by the board in the handling of the card.

It is obvious from the testimony in the case that it was a question of fact as to whether the card was actually received and, if it was received, the card was misfiled and lost by the board after it was received. The Government merely relied upon the presumption that the draft board clerks did their duty in handling the mail.

On this important question of fact, as above stated, the trial court at no time presented the theory of the petitioner to the jury for its consideration as to whether or not the card was received and whether the draft board employees did their duty in handling it.

The trial court should have presented to the jury the proposition that the presumption that an employee does his duty could not substitute for evidence and testimony

that the card was received. This issue was specifically raised in petitioner's Requested Instruction No. 45.

The trial court, as above shown, merely gave a general instruction on the presumption of receipt of correspondence duly addressed, stamped and deposited in the mails. Petitioner was entitled to have an instruction to the jury that the presumption of the receipt of the card mailed by the petitioner in Los Angeles could not be overcome or rebutted by the mere presumption that the board employees performed their duties.

The trial court should have instructed that the burden was upon the Government to prove by testimony of the employees that the card was actually not received by the board. This issue of fact was specifically requested in petitioner's Requested Instruction No. 46.

These two instructions refused by the trial judge in this the fourth trial of this case are instructions that were identical to those among the group that were refused by the first judge who presided at the first trial of this case.

The court below on the first appeal said: "Furthermore, the theories of the defense were not presented. Many questions of fact were suggested by the defense upon which the court did not require the jury to find. The defense sufficiently raised these matters."—266 F. 2d 389.

It is suggested that for the same reason and because of the same error committed by the trial judge on the fourth trial of this case as was committed by the trial judge at the first trial of this case the court below should have reversed the conviction.

In *Rosenthal* v. *Walker,* 111 U. S. 185, 193 (1884), it was held that the presumption of delivery of a letter does not arise until the letter is "proved to have been either put into the post office or delivered to the postman, * * *."

In *Henderson* v. *Carbondale Coal and Coke Co.,* 140 U. S. 25, 37 (1891), the same holding was made. The Court said: "This is not a conclusive presumption, and it does

not even create a legal presumption that such letters were actually received, * * *." The Court went on to say: "But no such presumption arises unless it appears that the person addressed resided in the city or town to which the letter was addressed * * *."

In *Schutz* v. *Jordan*, 141 U. S. 213, 230 (1891), Justice Brewer said: "So while the mailing of a letter creates an inference, raises a presumption that the party to whom it was addressed received it in due course of mail, and thus acquired knowledge of the matters stated therein, yet such presumption is one of fact, not of law. It is not conclusive, but subject to control and limitation by other facts."

See also *Crude Oil Corp.* v. *Comm'r of Internal Revenue*, 161 F. 2d 809, 810 (10th Cir. 1947); *Central Paper Co.* v. *Comm'r of Internal Revenue*, 199 F. 2d 902, 904-905 (1952); *Arkansas Motor Coaches* v. *Comm'r of Internal Revenue*, 198 F. 2d 189, 191 (1952).

This is a criminal case. The burden is upon the Government to prove that the card was actually not mailed. There is no presumption of legality in administrative proceedings where there is a prosecution in a criminal case based upon such administrative proceedings. The reason is that the presumption of innocence rebuts and repels the presumption of regularity in administrative proceedings.

In *Jones on Evidence in Civil Cases*, Fourth Edition, Bancroft-Whitney Co., San Francisco, 1938, Vol. 1, § 101, it is said: "Generally speaking, no legal presumption is so highly favored as that of innocence; ordinarily substantially all other presumptions yield to it in case of conflict." There the author cites *Dunlop* v. *United States*, 165 U. S. 486 (1897), and *Edwards* v. *United States*, 7 F 2d 357. It is later stated in this section, fourth paragraph, that the presumption of innocence prevails over a large number of other presumptions.

Notwithstanding *Koch* v. *United States*, 150 F. 2d 762, 763 (4th Cir. 1945), and *United States* v. *Fratrick*, 140 F. 2d 5, 7 (7th Cir. 1944), to the contrary, petitioner says that

the presumption of innocence in criminal proceedings makes inapplicable such presumption of regularity.

It is respectfully submitted that the trial court committed reversible error in refusing to instruct the jury as specifically requested in petitioner's Requested Instructions Nos. 45 and 46.

CONCLUSION

It is submitted therefore, that the judgment of the court below, affirming the judgment of conviction of petitioner in the United States District Court for the Southern District of California, Southern Division, should be reversed and a mandate should issue commanding the District Court to render and enter a judgment of acquittal; or, in the alternative, the case should be remanded to the District Court for a new trial because of the errors of the District Court in refusing the two vital instructions Nos. 45 and 46.

Respectfully,

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